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Constitutional Problems of County Home Rule in Ohio

Earl L. Shoup

THE AMENDMENT to the Ohio Constitution adopted in November, 1933,¹ granting the privilege of home rule to counties, generated a whole series of constitutional problems just as had the municipal home rule amendment of 1912.² After more than a third of a century of judicial interpretation the boundaries of the area of municipal autonomy are in a fluid state.

Home rule is the term commonly used to designate the grant by constitutional provision or statute of the right of self-government to a political subdivision of the state.³

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Since a statutory grant of this kind is revocable at the pleasure of the legislature, the term is more properly applied to a constitutional grant. The various local option laws with respect to the sale of intoxicating liquors giving the right of local prohibition to townships, municipalities and counties were examples of statutory home rule in a limited field.⁴ Prior to 1912, when the municipal home rule

municipalities and counties were examples of statutory home rule in a limited field.⁴ Prior to 1912, when the municipal home rule

¹ OHIO CONST. Art. X, §§ 1-4.

² OHIO CONST. Art. XVIII, §§ 1-9. Previous to this several states, by special constitutional authorization, had given home rule of greater or less degree to individual city-counties: Maryland to Baltimore in 1851 [MD. CONST. Art. III, §§ 2, 3; 3 THORPE, THE FEDERAL, AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1721]; Missouri to St. Louis in 1875 [MO. CONST. Art. IX, § 20; 4 THORPE, *op. cit.* at 2257, 2258]; Colorado to Denver in 1902 [COLO. CONST. Art. XX, §§ 1-8]. A constitution, silent on county organization, enabled California to make a similar grant to the City and County of San Francisco by statute in 1858 [Cal. Stat. 1858, c. 108. See also the Consolidation Act of 1856, Cal. Stat. 1856, c. 125; NATIONAL MUNICIPAL LEAGUE, THE GOVERNMENT OF METROPOLITAN AREAS 175 (1930)].

³ 8 OHIO JUR., Constitutional Law §§ 2-8, 209, 210.

⁴ 83 Ohio Laws 157; 85 Ohio Laws 87, 517; Hockett v. State Liquor Licensing

amendment was adopted, no political subdivision of Ohio possessed any degree of home rule by constitutional mandate. The municipalities, as well as all other subdivisions, possessed only such powers as were delegated to them by the General Assembly, and these might be altered at any legislative session.⁵

Much of the difficulty in the interpretation of home rule stems from the constitutional nature of the state itself. While the states are members of a national federal union, individually they are unitary in nature. In the absence of state constitutional provisions to the contrary, the central state government is supreme in all matters not delegated to the federal government. Units of local government in number, character and powers are established by the state on the principle of need and convenience.⁶ The powers they exercise are delegated state powers. So long as the delegation was by statute, judicial interpretation of their metes and bounds was of less moment because subject to subsequent legislative modification. The establishment of constitutional municipal home rule, however, was a fundamental change.⁷ The state's sovereign powers were split in two, giving a limited federal character to the unitary state. The city council as well as the General Assembly was now supreme in its own field.

The line of demarcation between the state and municipal fields was left to be traced by the courts in the course of routine litigation. On the one side is the general legislative supremacy of the General Assembly; on the other, "all powers of local self-

Board, 91 Ohio St. 176, 110 N.E. 485 (1915); *Hayner v. State*, 83 Ohio St. 178, 93 N.E. 900 (1910); *Gordon v. State*, 46 Ohio St. 607, 23 N.E. 63 (1889).

⁵ *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595 (1923); *Commissioners of Portage County v. Gates*, 83 Ohio St. 19, 93 N.E. 255 (1910); *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N.E. 445 (1887); *Bloom v. Xenia*, 32 Ohio St. 461 (1877); *Commissioners of Lake County v. Commissioners of Ashtabula County*, 24 Ohio St. 393 (1873).

⁶ 1 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 145 (2d ed. 1945).

⁷ "The Legislature may, within the limits of the Constitution, give the municipal corporation all the powers such an artificial personality is capable of receiving, and make it, to use the expression of the Supreme Court of the United States, a miniature state within its locality." 1 McQUILLIN, *op. cit. supra* note 6, § 145, citing *Paulsen v. Portland*, 149 U.S. 30, 38, 13 Sup. Ct. 750, 752 (1893). "As to both form of organization and conduct of the municipal government, a constitutional charter must always conform to the state constitution and laws generally operative throughout the state." 1 McQUILLIN, *op. cit. supra* note 6, § 342, p. 928. An excessive delegation of powers to the municipality would probably be violative of the Federal requirement of a republican form of government and implied sovereignty of the state. U. S. CONST. Art. IV, § 4; *People v. Cassidy*, 50 Colo. 503, *sub. nom.* *People v. Curtice*, 117 Pac. 357 (1911); *People ex rel. Elder v. Sours*, 31 Colo. 369, 74 Pac. 167 (1903).

government", including the adoption and enforcement of "such local police, sanitary, and other similar regulations, as are not in conflict with general laws".⁸ The language of this definition of the municipal area of government, with its combination of a broad general grant and specific grants, has been too much for judicial artistry.⁹ And yet with the wavering conceptions of municipal powers, as will be discussed hereafter, is intimately bound up some basic problems of county home rule.

THE NATURE OF THE COUNTY AND ITS FUNCTIONS

The county is the primary political subdivision of the State of Ohio, as it is of all the states of the Union outside New England.¹⁰

This thousand-year-old institution, including several of its typical offices, is deeply embedded in the common law as well as in the consciousness of the people. The power of the state to create territorial subdivisions for the conduct of its government, whether counties, municipalities, townships or special districts, is a necessary corollary of the doctrine of state sovereignty, and would inhere in the General Assembly even if not conferred by the state constitution. On the other hand, if the state constitution confers the powers of self-government on the people of any locality, large or small, even though this should involve the abolition of ancient units of local government, this is the supreme law of the state, binding on the courts as well as the legislature.

⁸ OHIO CONST. Art. XVIII, § 3.

⁹ The inherent difficulty in drawing a line between state and municipal powers is set forth by McQuillin: "Repeated attempts by constitution framers, legislators, and courts have been successful in part only, and sometimes have introduced doubt and confusion." 1 McQUILLIN, *op. cit. supra* note 6, § 194. The consequence is there are no well established rules or principles by which to determine what are municipal and what are state affairs. *Ibid.* In Ohio, particularly, no determinable rule has been established by the courts. Hitchcock, *Ohio Ordinances in Conflict with General Laws*, 16 U. CIN. L. REV. 1 (1942). "Indisputably these provisions are hazy and ambiguous, and it is unfortunate that the members of the constitutional convention did not more fully define the powers of local self-government committed to chartered cities, and thus relieve the courts from exercise of wide discretion and from never ending appeals for construction of this constitutional clause; and likewise relieve the judicial department of the government from the criticism too often made that it has exercised the power of framing a constitution—a power that has been lodged solely in the people." Jones, J., in *State ex rel. Toledo v. Cooper*, 97 Ohio St. 86, 91, 119 N.E. 253, 254 (1917).

¹⁰ *Ward v. County of Hartford*, 12 Conn. 404 (1838); *Russell v. The Men of Devon*, 2 T. R. 667, 100 Eng. Rep. 359 (Ch. 1788); FAIRLIE AND KNIER, *COUNTY GOVERNMENT AND ADMINISTRATION* 23-36 (1930); HOWARD, *LOCAL CONSTITUTIONAL HISTORY OF THE UNITED STATES* 298-301, 358, 365, 368 (1889).

The Ordinance of 1787, for the government of the territory northwest of the Ohio River, provided that the Governor should "proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature."¹¹ Acting under this authority, Governor St. Clair in 1788 laid out the huge county of Washington, which comprised, roughly speaking, the eastern half of the present State of Ohio. Hamilton County, as laid out in 1790 and extended in 1792, embraced the greater share of the western half of Ohio and the eastern half of the southern peninsula of the present State of Michigan. By the time of its admission to the Union in 1803, the territory of Ohio had been divided into ten counties.¹² By successive subdivisions, a total of eighty-eight counties eventually appeared. The state's first constitution definitely conferred on the General Assembly the power to establish counties, with the sole limitation that none should be reduced to less than 400 square miles.¹³ This provision remains unchanged except for the addition that all changes of county lines must be ratified by popular referendum in the counties affected.¹⁴

The county historically was created to discharge functions of significance to the state as a whole. This was well stated by the court in an Illinois case: "County and township organizations are created in this State with a view to carrying out the policy of the State at large for the administration of matters of political government, finance, education, taxing, care of the poor, military organizations, means of travel and the administration of justice. The powers and functions of county and township organizations, therefore, as distinguished from municipal corporations, have a direct and exclusive bearing on and reference to the general, rather than local, policy of government of the State."¹⁵ In a federal case, decided in 1845, Chief Justice Taney, speaking of the Maryland counties, used the language: "The several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers

¹¹ § 8.

¹² PATTERSON, *THE CONSTITUTIONS OF OHIO* 71, 72 (1912).

¹³ OHIO CONST. Art. VII, § 3 (1802); PATTERSON, *op. cit. supra* note 12, at 46.

¹⁴ OHIO CONST. Art. II, § 30.

¹⁵ *Cook County v. Chicago*, 311 Ill. 234, 240, 142 N.E. 512, 513 (1924); see FAIRLIE AND KNIER, *op. cit. supra* note 9, at 42.

of government. They form together one political body in which the sovereignty resides."¹⁶ The language of the court in a recent North Carolina case is typical of rulings found in decisions in all the states of the Union: ". . . all the powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy."¹⁷

Speaking for the Ohio Supreme Court in 1857, Judge Brinkerhoff drew the line between the position of counties and municipalities as political units in the following words:

Counties are local subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization [a municipality] is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy."¹⁸

The major portion of the functions of the county are generally the same in all the states of the Union outside of New England.¹⁹ That they are concerned primarily with questions of state policy is plainly evident by a partial enumeration of those conferred on counties in Ohio. These include the assessment and collection of taxes and the custody of public funds,²⁰ the survey-

¹⁶ *Maryland v. Baltimore & Ohio R. R.*, 3 How. (44 U.S.) 534, 550 (1845).

¹⁷ *Martin v. Commissioners of Wake County*, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935), quoting from *O'Berry v. Mecklenburg County*, 198 N.C. 357, 360, 151 S.E. 880, 882 (1930). See also *Cook County v. Chicago*, 311 Ill. 234, 142 N.E. 512 (1924).

¹⁸ *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109, 118 (1857).

¹⁹ FAIRLIE AND KNIER, *COUNTY GOVERNMENT AND ADMINISTRATION* 238 (1930).

²⁰ OHIO GEN. CODE §§ 2583, 2638 to 2749.

ing of lands,²¹ the recording of land titles,²² institutional care of the poor²³ and the arrest, detention and prosecution of offenders against the criminal laws of the state.²⁴ As the state becomes more urban in character, requiring the extension of the police power, the General Assembly from time to time imposes on the county, as a convenient repository, the administration of some of these laws. Examples include the provisions for the hospitalization of the poor,²⁵ the care of the tubercular²⁶ and orphans,²⁷ soldiers' and sailors' relief,²⁸ old age pensions²⁹ and sewer³⁰ and water supply³¹ systems.

In view of the character of the functions and services performed by the counties, it is plain that full power to legislate on them could not be delegated to the individual counties without the destruction of the unity of the state government. With a few exceptions, the task of the county is to administer state policy. But with respect to the form and the machinery of government to administer the state laws, there is not only no inherent reason for uniformity but an actual necessity for the adaptation of the governments of the varying counties to the administrative problems which confront them. With these conclusions, the county home rule amendment, as adopted, is entirely consistent.

THE COUNTY HOME RULE AMENDMENT

The county home rule amendment³² is in the form of a complete substitute for Article X of the Ohio Constitution, which covered the matters of county and township government and, by implication, required uniformity throughout the State. Section 1 requires the General Assembly to provide by general law for the organization and government of counties. This section further provides that individual municipalities and townships by contract may transfer to the county any of their powers. The rights of initiative and referendum are reserved to the people of such mu-

²¹ *Id.* § 2792.

²² *Id.* § 2757.

²³ *Id.* §§ 2419-1, -2, -3, 2522.

²⁴ *Id.* §§ 2833, 2843, 2850, 2916.

²⁵ *Id.* §§ 3127 to 3138-1.

²⁶ *Id.* §§ 3127 to 3147.

²⁷ *Id.* §§ 3070, 3077.

²⁸ *Id.* §§ 2930 to 2949-4.

²⁹ *Id.* § 1359-12.

³⁰ *Id.* §§ 6602-10 to 6602-14.

³¹ *Id.* §§ 6602-17 to 6602-33c.

³² OHIO CONST. Art. X, §§ 1-4.

nicipalities or townships in respect to every measure making or revoking such transfer.

Section 2 covers the subject of township government. The right of county home rule and the procedure to be followed in securing it are the subject-matters of Sections 3 and 4.

Home rule may extend to either substantive or adjective matters, or to both. Home rule in substantive matters gives the power to legislate on matters affecting individual rights and privileges, including the services performed for the public such as water supply and the maintenance of peace. Home rule in adjective matters gives the power to legislate on matters of the form of government, including the number and arrangement of offices, administrative procedure and electoral processes. The municipal home rule amendment conferred substantive powers covering "all matters of local self-government", including such "local police, sanitary and other similar regulations, as are not in conflict with general laws", and adjective powers to "frame and adopt or amend a charter for its government".³³ The county home rule amendment, on the other hand, so far as it applies only to county affairs, confers only adjective power, in the words, "provide the form of government of the county and . . . determine which of its officers shall be elected and the manner of their election."³⁴

The General Assembly remains the arbiter as to what services the county may discharge.³⁵ Governmental machinery set up in a county charter must be made to conform to the substantive powers which the legislature has conferred. Conversely, any subsequent legislation depriving counties generally of a function now possessed, such as the recording of land titles, would necessitate a corresponding alteration in the structure of the county government.

The amendment, however, gives the alternative of going beyond county powers and provides that a county charter may take a second step by including one, a few, or many of the powers of municipalities; or a third step, by incorporating the county as a municipal corporation proper, and so merging all the powers of the constituent municipalities and townships with those of the county. The constitutional problems arising from each of these three plans will be taken up in the reverse order in which they are here listed.

³³ OHIO CONST. Art. XVIII, § 3.

³⁴ OHIO CONST. Art. X, § 3.

³⁵ 1 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 145 (2d ed. 1945).

A CHARTER INCORPORATING THE COUNTY AS A MUNICIPAL CORPORATION

A. *What is a "municipal corporation" within the meaning of Article X of the Ohio Constitution?*

That artificial being, known as a corporation, is supposed to have originated with the Romans, who used it both for public and private purposes; hence the distinction between public and private corporations.³⁶ Rome, until its later days, was a city-state, and Italy was ruled as a collection of cities of various grades, known as *coloniae*, *praefecturae*, *municipia* or *civitates foederatae*. The two last-named classes were corporate entities with a considerable degree of independence. The term *municipium* came to be a generic term covering all classes of cities; hence, the laws obtaining in them were *municipal* laws. The term came to mean the internal, *civil*, *public* or *national* laws of a country as opposed to external or international laws.³⁷ The municipality as a public corporation existed in the early days of the English monarchy.³⁸ This broader meaning of the term "municipal" was adopted by Blackstone,³⁹ the mentor of the earlier generations of American jurists, and so was firmly established in the terminology of our jurisprudence.

A search of American statutes and constitutions shows that during the greater part of the nineteenth century, the term *municipal corporation* was used in Blackstonian sense as equivalent to *civil*, *public* or *political* corporation. Thus in the constitutions of Alabama, North Carolina and Montana, cities, counties, and townships are all designated as municipal corporations.⁴⁰ Moreover, the courts in a number of states, among which are Iowa, Illinois, Indiana, California, North and South Carolina, Oklahoma, Texas, Washington and Wyoming, have classed counties or other state districts as *municipal* corporations, meaning

³⁶ 1 BL. COMMENTARIES *468; MOREY, OUTLINES OF ROMAN LAW 50 (2d ed. 1914).

³⁷ MOREY, *op. cit. supra* note 36, at 50, 51; POSTE, THE ELEMENTS OF ROMAN LAW 335 (1902); 1 BL. COMMENTARIES *44.

³⁸ TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 78 (7th ed. 1911).

³⁹ "I call it municipal law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one *state* or *nation*, which is governed by the same laws or customs." 1 BL. COMMENTARIES *44.

⁴⁰ ALA. CONST. Art. XII; MONT. CONST. Art. XVI; N.C. CONST. Art. VII.

thereby *public* corporations.⁴¹ Counties in New York were by statute designated as *municipal* corporations.⁴² In late years, with the increased importance of urban communities, the term "municipal corporation" has come to be used chiefly as the designation of an incorporated city or village; which narrower use has resulted in some confusion.⁴³

Following this analysis, public corporations—that is, those intended to assist in the conduct of civil governments—fall into two classes: municipal corporations and simple public corporations.⁴⁴

The text of the Ohio Constitution as amended in 1912 leaves no doubt as to the sense in which the term municipal corporation was there employed. Article XVIII, styled "Municipal Corporations", begins, "Municipal corporations are hereby classified into cities and villages". If any further identification were necessary, Section 3 goes on to state that these shall have authority to exercise "all powers of local self-government. . . ." The Constitution of 1851, as originally adopted, treated cities and villages along with private corporations under the heading of "Corporations", while counties and townships were covered in separate articles.⁴⁵ The Ohio county never has had the status even of a simple public corporation. In the language of Judge Sutliff, it is a mere "political organization of certain of the territory within the state, particularly defined by geographical limits, for the more convenient administration of the laws and police power of the state, and for the convenience of the inhabitants."⁴⁶ Partaking

⁴¹ *Commissioners of Tippecanoe County v. Lucas*, 3 Otto (93 U.S.) 108 (1876); *Commissioners of Laramie County v. Commissioners of Albany County*, 2 Otto (92 U.S.) 307 (1876); *In re Sanitary Board of East Fruitvale Sanitary Dist.*, 158 Cal. 453, 111 Pac. 368 (1910); *Maulding v. Skillet Fork River Drainage Dist.*, 313 Ill. 216, 145 N.E. 227 (1924); *People v. Bowman*, 247 Ill. 276, 93 N.E. 244 (1910); *People v. Nibbe*, 150 Ill. 269, 37 N.E. 217 (1894); *Curry v. District Township of Sioux City*, 62 Iowa 102, 17 N.W. 191 (1883); *Gooch v. Gregory*, 65 N.C. 142 (1871); *Territory v. Hopkins*, 9 Okla. 935, 59 Pac. 976 (1899); *Glenn v. County of York*, 6 S.C. 412 (1873); *Brite v. Atascosa County*, 247 S.W. 878 (Tex. Civ. App. 1923); *Weatherwax v. Grays Harbor County*, 116 Wash. 212, 199 Pac. 303 (1921).

⁴² N. Y. COUNTY LAW § 3; *Kennedy v. Queens County*, 47 App. Div. 250, 62 N. Y. Supp. 276 (2d Dep't 1900).

⁴³ Cf. the interpretation given the term by FAIRLIE AND KNIER, *COUNTY GOVERNMENT AND ADMINISTRATION* 41-42 (1930).

⁴⁴ "The phrase 'municipal corporations', in the contemplation of this treatise, has reference to *incorporated villages, towns, and cities*, with power of local administration, as distinguished from other public corporations, such as counties and quasi-corporations." 1 DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 34, p. 62 (5th ed. 1911).

⁴⁵ Art. X, XIII.

⁴⁶ *Hunter v. Commissioners of Mercer County*, 10 Ohio St. 515, 520 (1860);

of some of the qualities of a corporation, it has been classed as a *quasi* corporation.⁴⁷ A statute raises every county which adopts a charter to the dignity of a simple public corporation;⁴⁸ but under the county home rule amendment, any county may adopt a charter declaring itself a municipal corporation proper,⁴⁹ by which act it not only continues to discharge the powers and functions vested in counties and county officers but also attains the status and powers defined for such municipalities in Article XVIII.

B. *Whether such an incorporated county would remain a county within the meaning of the constitution and laws.*

Would the act of incorporation as a municipal corporation have the effect of setting off the territory of the county as an entirely new and distinct entity? The experience of several other states throws some light on the question. San Francisco was set off from the rural portion of its county by an act of the legislature in 1856 and given the status of a "city and county".⁵⁰ In 1879, this arrangement was fortified by a constitutional amendment.⁵¹ Denver in like manner was constituted a "city and county" in 1902.⁵² Baltimore, in 1851,⁵³ and St. Louis, in 1875,⁵⁴ by constitutional amendment were set off from the counties of which they had been a part, but were not given the title of "county". However, for many purposes they were counties. In the case of Baltimore, most of the county offices were continued and made elective by the electors of the city;⁵⁵ in the case of St. Louis, a Missouri Court of Appeals, in 1877, ruled that "because the organization of this body as a city is pronounced and its features strongly marked, and because they thus reduce its attributes as a county into comparative insignificance, it does not follow that the latter do not exist",⁵⁶ and this ruling was later confirmed by the Supreme Court of the state.⁵⁷

see also *Carder v. Commissioners of Fayette County*, 16 Ohio St. 354, 369 (1865); *Commissioners of Gallia County v. Holcombe*, 7 Ohio Rep. 232 (1835).

⁴⁷ *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109 (1857).

⁴⁸ OHIO GEN. CODE § 2394-1.

⁴⁹ OHIO CONST. Art. X, § 3.

⁵⁰ Cal. Stat. c. 125 (1856).

⁵¹ CAL. CONST. Art. IV, § 31.

⁵² COLO. CONST. Art. XX, §§ 1-8.

⁵³ MD. CONST. Art. III, §§ 2, 3.

⁵⁴ MO. CONST. Art. IX, § 20.

⁵⁵ NATIONAL MUNICIPAL LEAGUE, *THE GOVERNMENT OF METROPOLITAN AREAS* 182 (1930).

⁵⁶ *Missouri ex rel. Beach v. Finn*, 4 Mo. App. 347, 350 (St. Louis Ct. App. 1877).

⁵⁷ *State ex rel. Francis v. Dillon*, 87 Mo. 487 (1885).

The case of an Ohio county chartered as a municipal corporation proper is different. In all four instances cited above, the status of the city or county was determined by a constitutional amendment applying only to that particular case; the Ohio constitutional amendment is of general application. Sections 6 and 7 of Article IV, providing for Courts of Appeals and Probate Courts, premise the division of the entire territory of the state into counties, and the Schedule to the constitution adopted in 1912, by naming the counties of the state, has the effect of continuing their existence.⁵⁸ The home rule amendment, itself, by requiring all charters to make provision for the "exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law", continues in full vigor the large body of substantive laws of the state relating to counties. There would seem to be no reasonable doubt that a county organized as a municipal corporation remains among the counties of the state.

C. *Whether home rule would extend to all county functions.*

The question of the extent of the immunity of a city-county municipal corporation from the jurisdiction of the General Assembly would not seem to be one of great difficulty. The conclusion follows logically from a consideration of the limited grant of county home rule made in Article X and of the legal status, nature and functions of the Ohio county, as summarized above. Cities operate on the level of local affairs; counties, mainly, are agencies for the administration of state policies. The city-county would have neither more nor less than the sum total of home rule powers which would be possessed by the constituent cities and the county if operating individually under the home rule provisions of the constitution.⁵⁹ As a municipality, the city-county would have immunity from state legislation in both its substantive and adjective powers; as a county, in its adjective powers only. The General Assembly would have the same right, by general law, to vest non-municipal powers in the city-county, or to withdraw such powers from it and transfer them to other units of government, as it would have had if such a county had proceeded to a simple reorganization of its existing powers by charter.⁶⁰

⁵⁸ OHIO CONST. Schedule §§ 19, 20; see also Art. XI, § 7.

⁵⁹ 1 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 88, 145, 250 (2d ed. 1945).

⁶⁰ *Ibid.*

D. *The status of the constituent municipalities and townships.*

The county home rule amendment arranges in climactic order the three plans which may be followed in framing a charter: (1) confine its scope to county powers alone; (2) include a concurrent or exclusive exercise in all or part of its area, of any or all powers vested in municipalities; or (3) organize the county as a municipal corporation.⁶¹ The implication seems plain that, in the last-named plan, the constituent municipalities cease to exist and are merged with the county in one municipal corporation. That two municipal corporations, each vested with "all the powers of local self-government", can not exist on the same territory would seem self-evident.⁶² The incorporation of a county as a municipal corporation under Article X would act as a dissolution of all the constituent municipalities and their merging in the new city-county. As provided in the same article, this body would succeed to the rights, properties and obligations incident to their municipal powers, but new taxing districts could be created for the purpose of discharging the debts of the extinct units.⁶³

E. *Whether a borough-plan or federated city-county is authorized.*

In the borough plan of metropolitan government, the urban area is divided into districts to each of which is given a certain amount of administrative autonomy in local matters.⁶⁴ The government of New York City under its charter, as revised in 1907, is of this type.⁶⁵ Legislative power remains centralized in the city council. The principle of the federated city is the same except for the conferring of certain legislative powers on the boroughs. A charter of this type was drawn for Allegheny County, Pennsylvania, but failed of adoption.⁶⁶ As respects both plans, a city-county under the Ohio Constitution, chartered as a municipal corporation, would be in no different position from any other municipality. There is nothing in the constitution and laws to

⁶¹ OHIO CONST. Art. X, § 3.

⁶² "There cannot be, at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdictions, and privileges." 1 DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 354, p. 616 (5th ed. 1911); see *Taylor v. Fort Wayne*, 47 Ind. 274, 281 (1874).

⁶³ OHIO GEN. CODE § 3576. *Mount Pleasant v. Beckwith*, 100 U. S. 514 (1879); *Morgan v. Beliot*, 7 Wall. (74 U.S.) 613 (1868); *Township of Bloomfield v. Borough of Glen Ridge*, 54 N. J. Eq. 276, 33 Atl. 925 (Ch. 1896).

⁶⁴ NATIONAL MUNICIPAL LEAGUE, THE GOVERNMENT OF METROPOLITAN AREAS 342, 367 (1930).

⁶⁵ *Id.* at 344-356.

⁶⁶ *Id.* at 372-387.

prevent any municipality from delegating administrative powers to districts set up for that purpose. But while administrative power may be delegated, legislative power may not.⁶⁷ Presumably a further constitutional amendment would be necessary if the city-county as a municipal corporation were to be given the form of a federated city. However, a federation in effect could be obtained under the charter plan described immediately below, with the difference that the central government's powers would be enumerated and those of the constituent municipalities residual.⁶⁸

A CHARTER EMBODYING SOME MUNICIPAL POWERS

Under Article XVIII of the Ohio Constitution, no municipality, large or small, may be deprived of any power of local self-government without its consent. No exception existed until the adoption of Article X, the county home rule amendment, under which such a deprivation may be made if a certain four majorities of votes are obtained,⁶⁹ including a majority of those voting on the question in a majority of the municipalities and townships in the county for which home rule is sought. Municipal home rule has yielded to county home rule in one respect—unanimous consent for the surrender of a municipal power has given way to majority consent. A county home rule government starting out with no municipal powers might in time become an institution of great significance by successive charter amendments vesting in it municipal powers. As powers were surrendered, the charters of the various municipalities would require corresponding changes by abolishing offices which now had no duties. Conceivably successive surrenders of powers might eventually leave the municipalities mere shells of themselves. They would remain municipal corporations with attenuated powers; while the county, without such a status, would exercise some of the substantive powers typical of a municipal corporation. The state constitution, in effect, recognizes a second type of municipal corporation which, after the surrender of powers to the county, does not possess all the powers of local self-government.

⁶⁷ *Cincinnati v. Cook*, 107 Ohio St. 223, 140 N.E. 655 (1923); *Akron v. Dodson*, 81 Ohio St. 66, 90 N.E. 123 (1909); 8 OHIO JUR., Constitutional Law §§ 212, 217, 218.

⁶⁸ Municipal powers vested in the county by the constitutional procedure would necessarily be specific and enumerated.

⁶⁹ See note 75 *infra*.

A CHARTER EMBODYING ONLY COUNTY POWERS

The minimal alternative of a county charter commission is the reorganization of the county government to administer such powers alone as are conferred on counties by statute. Four counties, Cuyahoga, Hamilton, Lucas and Mahoning, chose charter commissions at the general election of November, 1934. All submitted charters to the electors at the general election the year following, but only in Cuyahoga County did the charter receive a county-wide majority of the votes cast on the question. In all four cases the charter submitted purported to include only county powers.

A. *County Powers.*

The state constitution requires as a minimum that provision be made, in any charter drawn, for the "exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law".⁷⁰ Presumably, any charter failing to meet this requirement would be *prima facie* invalid. Accordingly, each of the four charters, while enumerating certain powers vested in the counties by the General Code and apportioning them to designated officers, prudently indicated a repository for all others, including such as might thereafter be imposed by law.⁷¹

B. *Form of Government.*

"Every . . . [county] charter shall provide the form of government of the county and . . . determine which of its officers shall be elected and the manner of their election."⁷² The "form of government" has reference to the number, names, arrangement and groupings of offices, and their relations to each other; to the methods of their choice and terms of office; to the allocation of duties among them; and, in general, to the administrative procedure governing them in the performance of their duties. In all the charters, except that of Mahoning, the manager form of government, widely used in municipalities, was taken as the plan of the proposed county government; and in the same three, wherever administrative procedure was left undefined, the board of county commissioners or the county council, as the case might be, was

⁷⁰ OHIO CONST. Art X, § 3.

⁷¹ Proposed Charter for the County of Cuyahoga, Art. II, § 1; County of Hamilton, Art. I, § 1 and Art. II, § 1; Lucas County, Art. I, § 1 and Art. II, § 1; Mahoning County, Art. II, § 1.

⁷² OHIO CONST. Art. X, § 3.

empowered to supply this want, or that prescribed by general law was adopted.⁷³

C. *What is a Municipal Power within the Meaning of Article X?*

"No charter or amendment vesting any municipal powers in the county shall become effective unless it shall have been approved" by four designated majorities.⁷⁴ This provision makes the definition of "municipal power" within the meaning of Article X of crucial importance. If given a loose meaning, that portion of Article X authorizing the electors of a county by majority vote to reform the structure of their government is rendered virtually inoperative; and, if interpreted narrowly and technically, it deprives the electors of the municipalities and townships of the right to negative propositions to surrender municipal powers to the county. The correct rule of construction, obviously, is one which makes effective both methods of charter adoption.

First recourse would seem to be to the definition of municipal powers in Article XVIII as modified by the implications of Article X. The frailty of the language of the former, "all the powers of local self-government", is such as to offer only general guidance, as attested by many years of judicial handling. More precision is to be found in the language of Article X. The intent of the scheme of majorities requisite for the adoption of a county charter is not in doubt:⁷⁵ the three special majorities are called upon whenever a proposed county charter alters the established balance of powers between county and municipality. This is the crux of the matter.

A majority in a county-wide vote may adopt a county charter altering the form of government but not changing the range of its powers. The consent of the electors of the municipalities as such is not required since there is no alteration of the balance of powers.

Three extra majorities are required if the charter alters the

⁷³ Proposed Charter for the County of Cuyahoga, Art. I, § 3; County of Hamilton, Art. I, § 1; County of Lucas, Art. I, § 1.

⁷⁴ OHIO CONST. Art. X, § 3.

⁷⁵ "No charter or amendment vesting any municipal powers in the county shall become effective unless it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality)." OHIO CONST. Art. X, § 3.

balance of powers between county and municipality to the detriment of the latter: *first*, a majority of those voting on the question in the largest municipality, on the principle that the senior and major unit of local government with large investments in facilities for water supply, transportation, recreation and other services ought to have a veto on any proposal to vest their ownership and operation in the county; *second*, a majority of those voting on the question in all the county outside the largest municipality; while this may be less defensible, it is a concession to the interests peculiar to these residential areas; *third*, a majority vote in a majority of the municipalities and townships. As explained, this constitutes the great compromise between municipal autonomy and home rule on one side and the needs of county and metropolitan government on the other.

We now are in a position to enumerate the norms, both positive and negative, which are applicable to the construction of this portion of the county home rule amendment:

1. The test of the vesting of a municipal power in the county is whether the charter in effect alters the balance of power between county and municipality to the detriment of the latter.

2. The Ohio Constitution recognizes two classes of governmental powers: state powers, exercised variously by the central state government and its subdivisions, the county, township, and school, health, conservancy, park, and other districts; and municipal powers constitutionally vested in the municipality.

3. There is no inherent quality in a power of government which makes it "federal", "state", "county" or "municipal". Rather, a power falls in one of those categories for the simple reason that it has been so allocated by constitution or statute. The validity of Montesquieu's classic division of elementary powers of government into legislative, executive and judicial has not stood up under closer analysis.⁷⁶ Nor is there any immutable tradition which would control a unique delegation of power to a political subdivision.⁷⁷

4. Provision for the concurrent exercise by county and municipality of powers hitherto vested exclusively in the latter is a vest-

⁷⁶ MONTESQUIEU, *THE SPIRIT OF LAWS*, Bk. XI, c. vi (Nugent's ed. 1752). GOODNOW, *POLITICS AND ADMINISTRATION*, c. i-iii (1900); WILLOUGHBY, *PRINCIPLES OF PUBLIC ADMINISTRATION* 10-13 (1927).

⁷⁷ The legislature may strip a municipality "of every power, leaving it a corporation in name only; and it may create and re-create these changes as often as it chooses, or it may itself exercise directly within the locality any or all of the powers usually committed to a municipality." 1 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 145, p. 436 (2d ed. 1945).

ing of municipal powers in the county within the meaning of Article X.⁷⁸

5. Provision for the continued exercise of powers already administered concurrently by county and municipality—as, for instance, the enforcement of the criminal laws of the state—does not constitute a vesting of municipal powers in the county within the meaning of Article X. The charter is required to provide for “the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law”,⁷⁹ whether exclusive or concurrent, and fulfillment of this requirement in no way alters the balance of powers between county and municipality.

6. The inclusion in a county charter of administrative forms, procedures or the names and titles of offices commonly found in municipal charters does not constitute a vesting of municipal powers in the county. These are all components of a “form of government”⁸⁰ and the county charter is specifically authorized to formulate a “form of government”. The name of an office does not define its powers, but rather the terms of the statute creating the office. Naming the Louisiana county “parish” confers no ecclesiastical powers; or its county board “police jury” no judicial powers.⁸¹ That the “municipal powers” mentioned in Article XVIII comprehend only those of a substantive character seems reasonable. Adoption by a county charter of forms and nomenclature usually associated with municipalities in itself has nothing to do with the alteration of the balance of powers between the two units.

D. *Judicial Interpretation of the Vesting of Municipal Powers in the County.*

The only instance in which the county home rule amendment was before a court was in *State ex rel. Howland v. Krause*.⁸² This was an original action in mandamus to require the defendant to

⁷⁸ “Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities . . .” OHIO CONST. Art. X, § 3.

⁷⁹ OHIO CONST. Art. X, § 3.

⁸⁰ MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE*, 1916-1930 89-91 (1933), citing *State ex rel. Zien v. City of Duluth*, 134 Minn. 355, 159 N.W. 792 (1916); see also 1 McQUILLIN, *op. cit. supra* note 77, § 145.

⁸¹ FAIRLIE AND KNIER, *COUNTY GOVERNMENT AND ADMINISTRATION* §§ 115, 225 (1930).

⁸² 130 Ohio St. 455, 200 N. E. 512 (1936).

certify that the Cuyahoga charter had been duly approved and become effective. The charter had been voted for by a majority of those voting on the question in the county and in the largest city (Cleveland) but not in the area outside Cleveland or in a majority of the municipalities and townships. The relator claimed that the charter vested no municipal powers in the county and therefore, to become effective, needed only a majority of those voting on the question in the county. The respondents set forth various portions of the charter providing, they averred, that certain municipal powers were to be exercised by the county.

The court held that in "numerous instances" the charter sought to vest in the county powers which by the constitution and laws of the state are vested in the municipality. Only four, however, were cited: the power of the county council to enact ordinances, provision for the use of the initiative and referendum, the establishment of a civil service commission and the establishment of county police. The first three fall in the category of administrative agencies and procedure relating to the form of government; the last-named, in the category of concurrent substantive powers. The criteria accepted by the court in ruling these four to be instances of municipal powers seem to be as follows:

1. *The term or name employed in itself confers powers.*

The charter used the term "ordinance" for the acts of its county council, in the place of "resolution", used by the county commissioners, but confined their scope to such as were "necessary and proper to carry out the powers conferred on counties and county officers by this Charter and the Constitution and laws of the State".⁸³ The court concluded: "Clearly the authority to enact ordinances sought to be conferred upon the county is a municipal power".⁸⁴ Since no instance of municipal subject-matter was cited as having been included in the county council's ordinance-making field, presumably the use of the term ordinance was the criterion.

2. *Employment of agencies and procedures used by municipalities in itself confers municipal powers.*

Establishment of a county civil service commission, although

⁸³ Proposed Charter for the County of Cuyahoga, Art. IV, § 26.

⁸⁴ State *ex rel.* Howland v. Krause, 130 Ohio St. 455, 459, 200 N.E. 512, 514 (1936).

only for county purposes, was a municipal power because it had been "conferred upon and long exercised by the cities of this state"⁸⁵ and had "never been conferred upon a county".⁸⁶ The choice and promotion of civil servants, of course, is a procedural device for the filling of offices and not a substantive power. The use of the merit system probably is well within the home rule powers under the heading "form of government",⁸⁷ but specific statutory authorization for the employment of civil service commissions in charter counties had been given by a statute effective July 23, 1935.⁸⁸ Provision for the use of the initiative and the referendum on county questions likewise was held to be a municipal power.⁸⁹ As with the merit system, this is not a substantive power but a method of direct legislation by the people and presumably within the competence of a county charter in forming a frame of government.⁹⁰

3. *Inclusion of powers already exercised concurrently with the municipality is a vesting of municipal powers in the county.*

By the charter, the offices of sheriff and his deputies had been abolished and a Department of Public Safety headed by a director set up.⁹¹ It was provided that this new officer should have "all of the powers by general law now or hereafter vested in, and perform all of the duties now or hereafter imposed upon, the Sheriff, in the enforcement of the criminal laws of the State and of the ordinances of cities and villages within the County"; this was

⁸⁵ *Id.* at 460, 200 N.E. at 514.

⁸⁶ *Ibid.*

⁸⁷ The right has seldom been questioned in the courts. See *Jenkins v. Gronen*, 98 Wash. 128, 167 Pac. 916 (1917); *McGOLDRICK, op. cit. supra* note 80, at 76. In *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 344, 345, 103 N.E. 512, 514 (1913), the court said that "what officers shall administer the government, which ones shall be appointed and which elected, and the method of their appointment and election" are "essentials which are confronted at the very inception of any undertaking, to prepare the structure or constitution for any government."

⁸⁸ OHIO GEN. CODE § 2394 specifically authorizes the creation of a county civil service commission in charter counties.

⁸⁹ "The initiative and referendum are powers conferred by the Constitution upon municipalities, and such powers have not been vested by law in counties." *State ex rel. Howland v. Krause*, 130 Ohio St. 455, 460, 200 N.E. 512, 514 (1936).

⁹⁰ See note 80 *supra*; *HOLCOMBE, STATE GOVERNMENT IN THE UNITED STATES*, c. xvi (3d ed. 1931).

⁹¹ Proposed Charter for the County of Cuyahoga, Art. XV.

followed by an enumeration of his other duties in the language of the statutes. The County Council was authorized to implement the office: "To establish, maintain, and regulate a police force for the purpose of preserving the public peace and enforcing the laws of the State and the ordinances of the County Council."⁹² "These powers," the court contended, "are not only generally recognized as municipal powers, but are specifically so treated by the laws of the state Under this charter, a county-wide police force is provided for and the safety director is authorized to send officers into every municipality Nowhere has the Legislature conferred power upon a sheriff to enforce ordinances of either a city or a county council."⁹³ The court cannot have meant that the sheriff does not have peace powers coextensive with the county, including all municipalities and townships.⁹⁴ In fact there is no statutory demarcation between the peace powers of the sheriff and those of the municipal police. The significance of the court's ruling is that provision in a county charter for the continued exercise of previously established concurrent powers such as the enforcement of the criminal laws of the state, constitutes a vesting of municipal powers in the county.

CONCLUSION

Two chief objectives motivated the framers of the county home rule article of the Ohio Constitution: flexibility in the structure of the government of the counties to permit adaptation to their highly varied character and size, and the use of the wider boundaries of the county as a vehicle of metropolitan government. The populous county, both by establishing a modernized and respon-

⁹² *Id.* Art. IV, § 18.

⁹³ *State ex rel. Howland v. Krause*, 130 Ohio St. 455, 460, 200 N.E. 512, 514 (1936).

⁹⁴ OHIO GEN. CODE § 13432-1: "A sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer, herein designated as 'peace officers' shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained." OHIO GEN. CODE § 2833: "Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of the county as may be necessary." In *In re Sulzmann*, 125 Ohio St. 594, 597, 183 N.E. 531, 532 (1932), the court had held that the sheriff was "the chief law enforcement officer in the county, with jurisdiction coextensive with the county, including all municipalities and townships."

sible government and by acquiring from the constituent municipalities and townships additional powers, would be in a position to plan, legislate, and act on those matters which are of concern to the entire metropolitan community. This would be a step in the direction of simplification by eliminating overlapping powers and the necessity of creating special "authorities" for specific functions. Centralization of municipal powers in the government of the county is authorized in all degrees, from a complete to only a slight merging.

Counties also are empowered, without the intervention of a charter commission, to adopt any alternative charter which the General Assembly may set up;⁹⁵ and municipalities and townships are empowered, with the consent of the county, to transfer to the county any of their powers.

Many constitutional problems as yet unforeseen in detail would doubtless emerge in the event that a county home rule charter had become effective and was in operation. The general grounds of these have been indicated in the preceding text. In particular these problems would arise from: the complete dependence of the county on the legislature for its substantive powers, matters of bonded debt and taxation incidental to the transfer of municipal properties to the county where the corresponding function had been transferred, the uncertainty as to whether a given municipal power had been transferred to the county in whole or only in part, and the status of the attenuated municipal corporations. Last and most important, the county, endowed with some municipal functions, would inherit the perennial problem of the demarcation between municipal and state powers inherent in Article XVIII.

The initial problem is that of the law governing the adoption of county charters not intended to embody municipal powers. Here the laborious and uncertain method of constitutional revision might be used in efforts to make clear what provisions such a charter may contain. That the three majorities, additional to a majority of those voting in the county, are required to make effective a general transfer of municipal powers to the county, while stringent, is not indefensible. This requirement constitutes a compromise between the concepts of municipal home rule and county home rule. Perhaps with some reason the requirement of

⁹⁵ Alternative county charters were introduced in the General Assembly in S.B. No. 134, 91st General Assembly (1935-1936), and in H.B. No. 464, 92d General Assembly (1937-1938), but failed of adoption.

the third majority, that of a majority of those voting in a majority of the cities, villages, and townships, might be drawn to exclude villages and townships. Or revision might include an express exception of existing concurrent powers of counties and municipalities as constituting municipal powers within the meaning of Article X, and a definition of municipal powers as such. But the probabilities are that any rephrasing would not clarify but only add to the legal uncertainties. The fault goes much farther back than Article X. With the obscurities of the "all powers of local self government" clause of the municipal home rule article as the point of departure, the direction which a court would take in any such case as that of the Cuyahoga County Charter was bound to be unpredictable. Years of adjudication had brought neither clarification of the phrase nor even a reasonable *modus vivendi*.⁹⁶

The proper remedy for a constitutional provision made ineffective by judicial rulings is not the laborious device of constitutional revision but judicial action. The concepts of public law adopted by the court in the Cuyahoga County charter case for the determination of what constitutes a vesting of municipal powers in the county are deserving of re-examination. Those employed logically render inoperative that portion of the article empowering the electors by a county-wide vote to reorganize the county government with its existing substantive powers. For instance, if a charter fails to make provision for county duties in the enforcement of the criminal laws of the state, it is invalid because of failing to fulfill constitutional requirements; and if it does make such provision, having received only a county majority, it is ineffective because of having embodied a municipal power. The test of whether a county charter transfers a municipal power should be: Do the powers embodied in a county charter alter the balance of powers previously existing between county and municipality to the detriment of the latter? This test would satisfy the rule that impinging provisions of constitutions or statutes should be given that construction which renders both operative. Not to adopt it is in effect to declare a portion of the constitution inoperative, and that is a power reserved to the people in their sovereign capacity. Therefore, a redrafting and readoption of Article X would seem to hold little of promise; rather, a re-scrutiny by the court of the norms followed in the Cuyahoga County charter case is needed.

⁹⁶ See note 9 *supra*; MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930* 317-19 (1933).